No. 47931-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Daniel Terry,

Appellant.

Thurston County Superior Court Cause No. 15-1-00577-8

The Honorable Judge Mary Wilson

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Daniel Terry was outside of a Burger King in Olympia. He was homeless and disabled. CP 106; RP (7/16/15) 156-158; RP (8/5/15) 17. He tried to get money from passersby, and one person offered to buy him a burger. RP (7/16/15) 160. Mr. Terry waited for his burger outside. RP (7/16/15) 161. Mr. Terry's girlfriend Charlotte White was inside the restaurant. RP (7/15/15) 60-61. There was an order prohibiting contact between the couple. Ex. 1.

Darren Sylvester's wife was the assistant manager at the Burger King, and he was inside waiting for her to get off work. He thought that White and Mr. Terry "were acting suspicious". RP (7/15/15) 58. He'd seen them before[1] and believed they were not supposed to be inside of the Burger King. RP (7/15/15) 58.

Sylvester said that he called the police about the "suspicious activity". RP (7/15/15) 59. But the responding officer, and dispatch log, both said that a person at the Burger King named "Ashley" made the call. RP (7/6/15) 15; RP (7/15/15) 125-131. According to the responding officer, the call was to address an "unwanted person". RP (7/6/15) 8. The

[1] Sylvester testified that he had seen the couple before, RP (7/15/15) 58, and also that he had not seen them before. RP (7/15/15) 59.

caller told dispatch that the male had already left. RP (7/6/15) 27-28, 31-32.

Officer Noel got to the restaurant and saw a woman walking away from a man but gesturing or talking back to him. RP (7/6/15) 6. Sylvester met the officer outside and they spoke. RP (7/6/15) 7-8. Sylvester said that the woman was aggressively panhandling, noting that the woman involved was still inside the restaurant. RP (7/6/15) 9, 23-24. Sylvester also pointed out Mr. Terry as a person the woman had been talking with. Mr. Terry was now at the bus stop near the Burger King. RP (7/6/15) 8-10.

Noel went to talk to Mr. Terry, to investigate "aggressive panhandling". RP (7/6/15) 17.

As they spoke, Noel heard over the radio that the woman, who had been talking with another officer, was the protected party in a no contact order. RP (7/6/15) 11. The information included Mr. Terry's name as the restrained party, but Noel had not asked Mr. Terry for his name yet. RP (7/6/15) 12.

A bus came, and Mr. Terry did not get on it. RP (7/6/15) 12. He tried to get on the bus, but Noel asked him not to: "I said, hey, can you wait and let me finish talking to you?" RP (7/6/15) 18.

The officer got Mr. Terry's name and asked him if he'd been with White. Mr. Terry said he had not. RP (7/6/15) 12-13. Noel arrested Mr. Terry, and he was charged with felony violation of a protection order. RP (7/6/15) 13; CP 4.

The defense moved to suppress the evidence obtained from the illegal seizure of Mr. Terry. CP 5-18, 19-25. At the hearing, Noel testified that when he heard over the radio about the protection order, he did not have Mr. Terry's name yet. He also said that Mr. Terry was "not free to leave" when the bus arrived. RP (7/6/15) 18.

The court denied the defense motion. RP (7/6/15) 43-52; CP 26-28. The trial judge noted that whether the man who was the subject of the 911 call had left the restaurant or not had no impact on his ruling. RP (7/6/15) 43. He also said that whether there was ever probable cause to believe that Mr. Terry had violated the aggressive panhandling ordinance did not impact the ruling. RP (7/6/15) 46. The court instead found that the bus had arrived after the officer confirmed that a violation of a protection order had occurred. RP (7/6/15) 47-50; CP 26-28.

At trial, without a relevance objection, Sylvester told the jury:

> I witnessed two people on the -- that looked -- they were acting suspicious, the way they were – the behavior, I guess. I've seen them before, and I was made aware that they had had been involved in other things, I guess, and that they were banned from that Burger King. Because my wife does work there, and she made

> me aware that they were not supposed to be there, because we talked -- you know…
> RP (7/15/15) 58.

He also said that he told dispatch that "I believed a drug deal or something was being taken, I guess. I don't know. And suspicious activity. And I just don't tolerate that." RP (7/15/15) 59. Sylvester further claimed that Mr. Terry and White were talking earlier. RP (7/15/15) 65-68.

The defense proposed an instruction defining a violation of a court order:

> The person commits the crime of violation of a court order when he or she knows of the existence of a no contact order, and willfully violates a provision of the order and the person has twice been convicted for violating the provisions of a court order.
> WPIC 36.51.01, *State v. Clowes*, 104 Wash.App. 935, 18 P.3d 596 (2001), *State v. Sizemore*, 114 Wash.App. 11788 (2002), RCW 10.99.040(4)(a).
> CP 50.

The court declined this proposal, and instead defined the crime as follows:

> A person commits the crime of violation of a court order when he or she knows of the existence of a no contact order, and knowingly violates a provision of the order and the person has twice been previously convicted for violating the provisions of a court order.
> CP 68.

The defense also submitted an elements instruction:

> To convict the defendant of the crime of violation of a court order as charged in Count I, each of the following five elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about April 27, 2015, there existed a no contact order applicable to the defendant;

(2) That the defendant knew of the existence of this order;
(3) That on or about said date, the defendant willfully violated a provision of this order;
(4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
(5) That the defendant's act occurred in the State of Washington.
If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
WPIC 36.51.02
CP 55.

Instead of providing this instruction to the jury, the court instructed them:

To convict the defendant of the crime of violation of a court order as charged, each of the following five elements of the crime must be proved beyond a reasonable doubt:
(1) That on or about April 27, 2015, there existed a no contact order applicable to the defendant;
(2) That the defendant knew of the existence of this order;
(3) That on or about said date, the defendant knowingly violated a provision of this order;
(4) That the defendant has twice been previously convicted for violating the provisions of a court order; and
(5) That the defendant's act occurred in the State of Washington.
If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
CP 70.

The jury convicted Mr. Terry as charged. CP 78-79.

The state alleged that Mr. Terry had 9 points for sentencing purposes. RP (8/5/15) 4-7. A written stipulation was filed that included information about two out-of-state prior convictions. CP 90-91. No underlying documentation was offered, and the court did not address the contents of the stipulation document. CP 90-91; RP (8/6/15) 3-24. The court sentenced Mr. Terry with 9 points. CP 95.

Mr. Terry timely appealed. CP 93-103, 87.

ARGUMENT

I. MR. TERRY'S CONVICTION VIOLATED DUE PROCESS BECAUSE THE COURT'S "TO CONVICT" INSTRUCTION OMITTED AN ESSENTIAL ELEMENT.

A. Standard of Review

Jury instructions are reviewed *de novo. Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 698, 359 P.3d 841 (2015). A court's instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). If a jury can construe a court's instructions to allow conviction without proof of an element, any resulting conviction violates due process. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

B. The "to convict" instruction relieved the prosecution of its obligation to willful violation of a protection order.

Due process prohibits a trial judge from instructing jurors in a manner that relieves the state of its burden of proof. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Here, the trial judge refused Mr. Terry's proposed instructions defining the offense, and instead gave instructions that relieved the state of its burden to prove a willful violation of a no contact order.

A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the court's elements instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed.[2] *State v. Smith,* 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

The "[w]illful violation of a court order" issued under RCW 10.99.050 "is punishable under RCW 26.50.110." RCW 10.99.050(2)(a). RCW 26.50.110 does not contain a *mens rea* requirement; thus, the mental state required for conviction hinges on the word "willful" in RCW 10.99.050(2)(a). *See* RCW 26.50.110(1)(a).

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[2] This is so even if the missing element is supplied by other instructions. *Id; Lorenz,* 152 Wn.2d 22 at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

In this context, the word "willful" must be interpreted to mean knowingly and intentionally. *State v. Clowes*, 104 Wn. App. 935, 945, 18 P.3d 596 (2001) *disapproved of on other grounds by State v. Nonog*, 169 Wn.2d 220, 237 P.3d 250 (2010). A defendant must "know of the no-contact order [and] must also have *intended* the contact." *Id.* (emphasis added).

This is consistent with the statutory definition of "willful." Under general requirements of culpability, "[a] requirement that an offense be committed wilfully is satisfied if a person acts knowingly... *unless a purpose to impose further requirements plainly appears.*" RCW 9A.08.010.

Here, the legislature's purpose to require more than a knowing violation is clear; otherwise, "a jury could convict based upon evidence that a defendant who knew of a no-contact order accidentally or inadvertently contacted the victim." *Clowes*, 104 Wn. App. at 945; *see also State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002) ("In essence, this means [the defendant] must have intended the contact.")

Here, the court's "to convict" instruction did not require proof of a knowing and intentional violation of the no-contact order. CP 70. Instead, as in *Clowes,* the court's instruction required only proof of a knowing

violation.[3] CP 70. This error requires reversal of Mr. Terry's conviction. *Clowes*, 104 Wn. App. at 945; *Smith,* 131 Wn.2d at 263. On retrial, the court's "to convict" instruction must make clear that a finding of guilt requires proof of a knowing and intentional violation. *Clowes*, 104 Wn. App. at 945.

II. THE TRIAL COURT ERRED BY ADMITTING ILLEGALLY OBTAINED EVIDENCE.

A. Standard of review

Appellate courts review *de novo* the issue of whether a warrantless seizure violates the constitution. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011).

B. The officer unlawfully seized Mr. Terry in the absence of a reasonable suspicion of criminal activity.

The federal and state constitutions both protect against unlawful seizure of persons. U.S. Const. Amends. IV, XIV; art. I, § 7; *Diluzio*, 162 Wn. App. at 590. Unlike the Fourth Amendment, the analysis under art. I,

[3] Separate instructions told jurors that "[i]t is... a defense... that the contact was not willful," and that willfulness requires proof of knowledge and intent. CP 71, 72. However, as the *Clowes* court noted, a jury should not have to "search outside the elements instruction to supplement the elements outlined there." *Clowes*, 104 Wn. App. at 945. Furthermore, these instructions did not make clear the state's burden to prove willfulness beyond a reasonable doubt. CP 71, 72. Some jurors may even have interpreted the instructions as outlining an affirmative defense, and burdened Mr. Terry with establishing a lack of willfulness.

§ 7 "focuses on the rights of the individual rather than on the reasonableness of the government action." *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008).

Warrantless seizures are *per se* unreasonable. *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). The state bears the burden of proving that a warrantless seizure falls into one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Id.* The exclusionary rule requires suppression of all evidence obtained pursuant to a person's unlawful seizure. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).[4]

An investigatory stop must be justified by suspicion of criminal activity that is well-founded, reasonable, and based on specific and articulable facts. *Doughty*, 170 Wn.2d at 62. Where suspicion is based on an informant's tip, the tip must exhibit sufficient indicia of reliability. *State v. Hopkins*, 128 Wn. App. 855, 862-863, 117 P.3d 377 (2005).

First, the government must show that the informant is reliable. *Id.* Second, the tip must either contain enough objective facts to justify the detention, or the police must corroborate the tip's non-innocuous details.

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[4] Certain exceptions recognized under the federal constitution do not apply under art. I, § 7. *See, e.g. State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (inevitable discovery exception); *State v. Afana*, 169 Wn.2d 169, 181, 233 P.3d 879 (2010) (good faith exception).

Id. See also State v. Sieler, 95 Wn.2d 43, 621 P.2d 1272 (1980); *State v. Hart*, 66 Wn. App. 1, 7, 830 P.2d 696 (1992), *opinion corrected* (July 27, 1992).

Here, police responded to a call regarding an "unwanted person" at Burger King. RP (7/6/15) 8. Officers learned there had been a woman inside the Burger King "aggressively panhandling." RP (7/6/15) 8, 9.

This did not provide the officers a well-founded and reasonable suspicion that Mr. Terry was engaged in criminal activity. *Doughty*, 170 Wn.2d at 62; *Hopkins*, 128 Wn. App. at 862-863.

The police did not speak to the 911 caller and learned no "objective facts" regarding criminal activity by anyone. Despite this, Officer Noel confronted Mr. Terry at the bus stop, told him he was being investigated for aggressive panhandling, and prevented him from getting on his bus. RP (7/6/15) 12, 17. The seizure was unlawful.[5] *Hopkins*, 128 Wn. App. at 862-863

Nor can the detention be justified by the existence of the protection order. Although the officer overheard that the woman had a protection order, he did not have any reason to believe that Mr. Terry was the

[5] The encounter was more than simply a "conversation.". Accordingly, Conclusion of Law No. 5 is unsupported.

respondent and did not even know Mr. Terry's name.[6] In other words, he "did not possess reasonable articulable facts to believe that the no-contact order referred to" the person he seized for investigation.[7] *State v. Allen*, 138 Wn. App. 463, 471, 157 P.3d 893 (2007).

Mr. Terry's conviction must be reversed and the charge dismissed with prejudice. *Id.*

III. THE COURT FAILED TO PROPERLY CALCULATE MR. TERRY'S OFFENDER SCORE.

A. Standard of Review.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013).

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[6] Furthermore, the testimony does not establish when the officers learned the name of the restrained party. Accordingly, Finding of Fact No. 11 and Conclusion of Law Nos. 6 and 7 are not supported by substantial evidence, and must be vacated. *State v. Fuentes*, 183 Wn.2d 149, 157, 352 P.3d 152 (2015); *State v. Rooney*, No. 46236-2, 2015 WL 5935471, at *2 (Wash. Ct. App. Oct. 13, 2015).

[7] Contrary to Finding of Fact No. 12 and Conclusions of Law Nos. 6 and 7, substantial evidence does not establish that Mr. Terry's bus arrived only after the officers learned that Mr. Terry was the person restrained by the no contact order. The finding must be vacated. *Fuentes*, 183 Wn.2d at 157.

B. Mr. Terry's two foreign convictions should not have contributed to his offender score.

For sentencing purposes, prior out-of-state convictions are classified according to their Washington equivalents, if any. RCW 9.94A.525(3). An out-of-state conviction may not be used to increase an offender score unless it is comparable to a Washington felony. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Comparability questions present issues of law. *State v. Jordan*, 180 Wn.2d 456, 460, 325 P.3d 181 (2014).[8]

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of the out-of-state statute are broader than its Washington counterpart, it would "(at least) raise serious Sixth Amendment concerns" to attempt to discern the underlying facts that were not found by a court or jury. *Descamps v. United States*, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) *reh'g denied,* 134 S.Ct. 41, 186 L.Ed.2d 955 (2013).

[8] Accordingly, comparability questions are reviewed *de novo*. *Id.*

1. Mr. Terry's 1999 Florida conviction is not comparable to a Washington felony.

Mr. Terry stipulated that he had a 1999 Florida conviction for "Unlawful Possession of a Controlled Substance." CP 90. He did not stipulate that he'd been convicted of possessing any particular substance in Florida, or that the offense was comparable to a Washington felony.[9]

Felony possession in Florida includes conduct that is not comparable to a felony in Washington. Specifically, in Florida, a 1999 conviction for possession may have stemmed from 20 grams or more of marijuana. *See* former Fla. Stat. Ann. § 893.13(6) (1999). In Washington, at that time, felony liability attached only to possession of more than 40 grams. *See* former RCW 69.50.401(e) (1999).

The Florida offense is thus broader than the Washington offense. The sentencing court should not have included the Florida conviction in Mr. Terry's offender score. *Thiefault*, 160 Wn.2d at 415. His sentence must be vacated and the case remanded for a new sentencing hearing with a corrected offender score. *Id.*

2. Mr. Terry's 1996 Oregon conviction is not comparable to a Washington felony.

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[9] Had he done so, the stipulation would not have been binding. *State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 790, 291 P.3d 939 *review denied*, 177 Wn.2d 1017, 304 P.3d 114 (2013).

Mr. Terry stipulated that he had a 1996 Oregon conviction for "Robbery 3," with an offense date of 1995. CP 90. He did not stipulate to any particular conduct. Third-degree robbery in Oregon is far broader than robbery in Washington. Accordingly, the prior conviction is not comparable to a Washington felony.

In Oregon, the 1995 statute defining third-degree robbery provided (in relevant part) that a person could be convicted if "in the course of committing or attempting to commit *theft* the person uses or threatens the immediate use of physical force upon another person with the intent of... [c]ompelling... another person to deliver the property *or to engage in other conduct which might aid in the commission of the theft*." Former O.R.S. 164.395 (1996) (emphasis added).

In other words, a person could be convicted of third-degree robbery for threatening a reluctant accomplice during the commission of a theft. Former O.R.S. 164.395 (1996). There is no comparable Washington crime.

The Court of Appeals has previously upheld inclusion of a third-degree robbery conviction from Oregon in an offender score. *State v. McIntyre*, 112 Wn. App. 478, 49 P.3d 151 (2002). *McIntyre* does not control here. The challenge in that case addressed whether Washington

allows conviction when force is used to retain property unlawfully taken. *Id.*, at 481-483.

Mr. Terry's challenge differs from that outlined in *McIntyre*. The *McIntyre* court did not consider conviction under the Oregon statute where the commission was by means of threatening an accomplice during the commission of theft.

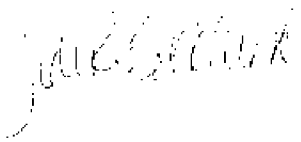
The Oregon "Robbery 3" should not have been included in Mr. Terry's offender score. Accordingly, his sentence must be vacated and the case remanded for a new sentencing hearing with a corrected offender score. *Thiefault*, 160 Wn.2d at 415.

CONCLUSION

Mr. Terry's conviction must be reversed and the case remanded for a new trial. In the alternative, if the conviction is not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on December 29, 2015,

BACKLUND AND MISTRY



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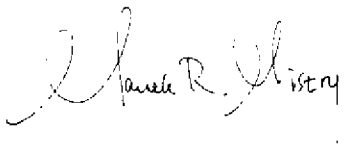

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Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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Washington State Penitentiary
1313 North 13th Avenue
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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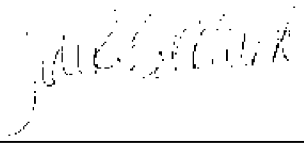

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Case Name: State v. Halleck
Court of Appeals Case Number: 47961-3

Is this a Personal Restraint Petition? Yes ■ No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

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Affidavit

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Personal Restraint Petition (PRP)

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